



In the Matter of:

JOHN DEGOSTIN,

ARB CASE NO. 98-042

COMPLAINANT,

ALJ CASE NO. 98-ERA-7

v.

DATE: May 4, 1998

BARTLETT NUCLEAR, INC.,

and

NORTHEAST UTILITIES COMPANY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Administrative Law Judge (ALJ) submitted a Recommended Order of Dismissal (R. O.) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1988 and Supp. V 1993), recommending that the complaint be dismissed for failure to file a timely request for a hearing. We agree with the ALJ that Complainant did not file a timely request for a hearing and the complaint will be dismissed.

BACKGROUND

Complainant filed a complaint under the ERA against both Bartlett Nuclear, Inc. and Northeast Utilities Company on August 25, 1997. The Occupational Safety and Health Administration (OSHA) issued separate determination letters on October 14, 1997 with respect to the complaint against each of the Respondents, finding that Complainant had not been discriminated against. Each letter notified Complainant that, if he sought a hearing on his complaint he was required to file a request for a hearing with the Chief Administrative Law Judge "within five (5) calendar days of receipt of [the determination] letter . . . by facsimile,

overnight/next day delivery mail or telegram . . .”^{1/} Also on October 14, 1997, OSHA referred the complaint to the Office of Administrative Law Judges, and the ALJ issued a hearing notice and pre-hearing order on October 28, 1997.

After a review of the file revealed that no request for a hearing had been filed, the ALJ issued an Order to Show Cause on November 6, 1997 ordering Complainant to show cause why the complaint should not be dismissed for failure to file a timely request for a hearing.^{2/} On Nov. 18, 1997, counsel for Complainant wrote a letter to the ALJ, which was received on Nov. 21, 1997,^{3/} stating that Complainant had received the Order to Show Cause and the Notice of Hearing and Pre-hearing Order before receiving the OSHA determination letter. The November 18, 1997 letter to the ALJ also stated that Complainant received the OSHA determination letter on November 9, 1997 and asked for clarification of the status of Complainant’s case and for additional time to file an appeal of the October 14, 1997 OSHA letter. The ALJ issued the Recommended Order of Dismissal on Dec. 1, 1997.

DISCUSSION

We agree with the ALJ that Complainant filed his request for a hearing out of time. The ALJ acknowledged that Complainant received some of the documents out of chronological order which may have caused some confusion. R. O. at 4. We concur with the ALJ’s holding that when Complainant received each of these documents, it should have put him on notice that his time to file a request for a hearing was running.

^{1/} OSHA’s correspondence to Complainant was sent by certified mail. By letter dated November 20, 1997 addressed to the ALJ, OSHA indicates that the certified letters were not claimed by Complainant after failed attempts at delivery on October 17, October 21 and November 2, 1997, at which point the materials were returned to OSHA by the Postal Service. OSHA then forwarded the materials to Complainant by regular mail. According to correspondence from Complainant’s attorney to the ALJ dated November 18, 1997, Complainant received the OSHA determination letter “on or about November 9, 1997.”

^{2/} In order to avoid confusion in the future, the Office of Administrative Law Judges or the ALJ to whom a case is assigned should assure that a timely request for a hearing has been filed before issuing a hearing notice and pre-hearing order.

^{3/} OSHA faxed a copy of Complainant’s counsel’s November 18 letter to the ALJ on Nov. 20, 1997. We will assume that letter was sufficient to meet the requirements of the regulations to file a request for a hearing and have used that date to determine whether the request was timely.

The ERA whistleblower protection provisions require expedited filing. The regulations in effect when Complainant submitted his complaint mandate that a request for a hearing be filed within five calendar days of receipt of the OSHA determination letter,^{4/} and that the request be filed by “facsimile (fax), telegram, hand delivery or next-day delivery service.” 29 C.F.R. §24.4(d)(2)(i) (1997).

The November 18, 1997 letter from Complainant’s attorney stated that he received the ALJ’s November 6, 1997 Order to Show Cause prior to November 9, 1997, when Complainant received the OSHA determination letter. Standing alone, the Order to Show Cause was sufficient to put Complainant on notice that a request for a hearing as required in the regulations had not been filed. *See* 29 C.F.R. §24.4(d)(2)(i). Moreover, the OSHA determination letter explicitly advised Complainant that “[t]o exercise [your right to a hearing] you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by facsimile, overnight/next day delivery mail or telegram[.]”

November 9, 1997 was a Sunday, suggesting that Complainant did not actually receive the OSHA determination letter on that specific date. We therefore assume for the purpose of determining timeliness, as did the ALJ, that the five day period provided in the regulations to file a request for a hearing began to run on November 10, 1997. Under the regulations, the last day to file a request for a hearing therefore was November 15, 1997.^{5/} The first correspondence from Complainant, dated November 18, 1997, was faxed by the Hartford OSHA office to the ALJ on November 20, 1997. R.D. at 3. Even if we interpret this correspondence as a request for hearing, it already was untimely. We note that the time limit for filing a request for a hearing has been strictly construed. *See Backen v. Entergy Operations, Inc.*, Case No 95-ERA-46, ARB Dec. June 7, 1996, slip op. at 4; *Crosier v. Westinghouse Hanford Co.*, Case No. 92-CAA-3, Sec. Dec. Jan. 12, 1994, slip op. at 10 (request for hearing not timely where filed by mailgram, rather than telegram, and received 10 days after expiration of time for requesting a hearing). Complainant has not offered any basis for tolling the time limit other than the receipt of documents and letters out of chronological order.

^{4/} Effective March 11, 1998, the filing deadline in ERA whistleblower cases was changed to require filing within five business days of the receipt of the OSHA determination letter. 63 Fed. Reg. 6622 (Feb. 9, 1998), to be codified at 29 C.F.R. §24.4(d)(2). However, the instant complaint was filed while the prior time limitation was in effect.

^{5/} In the recommended order below, the ALJ carried-over the filing limitation until the next business day, Monday, November 17, 1997. However, as noted above, the 29 C.F.R. Part 24 regulations in effect at the time of these events required filing within five calendar days.

Accordingly, for the reasons discussed above we adopt the ALJ's recommendation and the complaint in this case is DISMISSED.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member